APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED DECEMBER 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of December, one thousand nine hundred and ninety-seven.

PRESENT:

Hon. Frank X. Altimari,
Hon. John M. Walker, Jr.,
Hon. José A. Cabranes,
Circuit Judges.

Appendix A

No. 97-1189

UNITED STATES OF AMERICA,

Appellee,

v.

PEDRO ANTONIO GONZALES, ANGEL DURAN, JORGE DURAN,

Defendants,

HECTOR ARISTIS ALMANZAR DURAN, a/k/a Aristides,

Defendant-Appellant.

* * *

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard from the United States District Court for the Southern District of New York (Sotomayor, *J.*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is affirmed.

Defendant-appellant Hector Aristis Almanzar-Duran ("Almanzar-Duran") appeals from the March 20, 1997 judgment of conviction of the district court following jury trial, for

conspiring to distribute and possess with intent to distribute approximately four kilograms of cocaine in violation of 21 U.S.C. § 846, and sentencing Almanzar-Duran to a term of 168 months' incarceration and eight years' supervised release.

In particular, Almanzar-Duran claims, *inter alia*, (i) that the district court improperly admitted certain evidence at trial, (ii) that he received ineffective assistance of counsel, (iii) that his trial counsel failed to inform him of his right to testify at trial, and (iv) that the district court improperly imposed a two-level upward adjustment under U.S.S.G. § 3C1.1 for obstruction of justice.

Almanzar-Duran claims that the district court should have excluded testimony from the Officer Agent Reyes ("Reyes"), relating that a confidential informant had contacted Reyes before Reyes identified Almanzar-Duran as a member of the drug conspiracy with whom the agent had transacted in drugs seventeen months earlier. Almanzar-Duran also objects to the admission of prior similar act evidence. We review both evidentiary rulings for abuse or discretion. *See United States v. Thai.*, 29 F.3d 785, 813 (2d Cir. 1994). As to the confidential informant, we agree with the district court that the "information elicited by the government was necessary background information to explain the presence of the police officers at the scene and to give context to what occurred . . . ." Agent Reyes did not testify about the content of any conversation with the informant and was in no sense " 'a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from [an] informant.' " *United States v. Figueroa*, 750 F.2d 232, 239 (2d Cir. 1984) (quoting *United States v. Check*, 582 F.2d 668, 678 (2d Cir. 1978)).

Appendix A

Almanzar-Duran claims that Fed. R. Evid. 404(b) prohibited the introduction of evidence regarding three prior cocaine sales he made to accomplice Pedro Gonzalez. "[E]vidence of prior crimes, wrongs or acts is admissible for any purpose other than to show a defendant's criminal propensity," *United States v. Lasanta*, 978 F.2d 1300, 1307 (2d Cir. 1992) (internal quotation marks and citations omitted), unless the probative value of the proffered evidence is "substantially outweighed by the danger of unfair prejudice." *United States v. Zackson*, 12 F.3d 1178, 1182 (2d Cir. 1993). The evidence here was properly admitted as background information to explain the development of Almanzar-Duran's criminal relationship with his coconspirators, *see, e.g., United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996), as well as to support the basis for Gonzalez' ability to identify the defendant as the participant in the May 5, 1994 transaction at issue. Moreover, the district court properly instructed the jury to consider those prior acts only for the limited purpose of establishing Almanzar-Duran's identity and of understanding the background of his relationship with the other defendants and not for defendants' propensity to commit crimes.

For the reasons stated by the district court, Almanzar-Duran did not receive ineffective assistance of counsel at trial, and even if he did, was not prejudiced by such. Moreover, for the reasons stated by the district court, Almanzar-Duran's trial counsel did not deny him the right to testify in his defense nor fail to inform Almanzar-Duran of his right to testify.

Finally, the district court properly imposed a two-level upward departure under U.S.S.G. § 3C1.1 because Almanzar-Duran "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation,

prosecution, or sentencing of [his] offense" by falsely testifying at a post-trial hearing that his lawyer never advised him of his right to testify. We review the district court's findings of fact for clear error and give "due deference to the district court's application of the guidelines to the facts." *United States v. Davis*, 967 F.2d 84, 88–90 (2d Cir. 1992) (internal quotation marks and citations omitted). A defendant is subject to the enhancement under this Guideline if he "commit[s] . . . perjury." Application Note 3(b) to § 3C1.1. The district court found by clear and convincing evidence that Almanzar-Duran committed perjury at the post-trial hearing when he claimed that his trial counsel never informed him of his right to testify. In light of the substantial evidence presented at the post-trial hearing that Almanzar-Duran had been informed by trial counsel of his right to testify, we cannot find that the district court clearly erred in granting the upward departure.

We have carefully considered Almanzar-Duran's remaining arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOR THE COURT:

s/ Lucille Carr
GEORGE LANGE III, Clerk
by: Lucille Carr, Deputy Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 1:94CR00300-004

(For Offenses Committed On or After November 1, 1987)

Barry E. Schulman
Defendant's Attorney

UNITED STATES OF AMERICA

v.

HECTOR ALMANZAR-DURAN

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ was found guilty on count(s) after a plea of not guilty . . . as charged, after a Jury Trial.

Title & Section

21 U.S.C. 841

Nature of Offense

Conspiracy to Possess and Distribute a Controlled Substance

Appendix B

Date Offense Concluded

05/05/1994

Count Number(s)

1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 105-74-8972
Defendant's Date of Birth: 12/06/1966
Defendant's USM No.: 42709-054
Defendant's Residence Address:
640 Riverside Drive,
Apartment 4F
New York, NY 10031
Defendant's Mailing Address:
640 Riverside Drive,
Apartment 4F
New York, NY 10031

Appendix B

03/19/1997
Date of Imposition of Judgment

s/ Sonia Sotomayor

Hon. Sonia Sotomayor, U.S.D.J.
Name & Title of Judicial Officer

3/20/97
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 168 month(s).

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 year(s). (See additional Page)

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

* * *

ADDITIONAL SUPERVISED RELEASE TERMS

While on Supervised Release the Defendant shall submit to drug testing as demanded by the Probation Department. The Defendant shall also continue to make payments on the fine imposed at a rate of 10% of his gross monthly income.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	*Fine*	*Restitution*
Totals:	**$ 50.00**	**$ 2,500.00**	**$**

* * *

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ☒ In full immediately

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The $50.00 Special Assessment imposed shall be due immediately. The $2,500.00 Fine imposed shall be paid at the

rate of 10% of the Defendant's gross monthly earnings while in prison or, at a rate calculated under the Inmate Financial Responsibility Program, whichever is the lesser.

Upon release from prison, the Defendant shall continue to make payments at the rate of 10% of his gross-monthly income.

* * *

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): (See additional Page)

See Additional Factual Findings and Guideline Application Exceptions — Sheet 6.01

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: II

Imprisonment Range: 168 to 210 months

Supervised Release Range: 8 to — years

Fine Range: $17,500.00 to $4,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

Appendix B

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

The Court accepts the factual findings and offense level calculation of the pre-sentence report except for the corrections indicated in Defense counsel's letter addressed to the Probation Department, dated June 14, 1996, and

the Court enhances the Offense Level by 2 points raising it from 32 to 34 under Sec. 3C1.1 for obstruction of justice.

APPENDIX C — CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX D — RULES INVOLVED

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case, shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.